

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

.....  
In the matter of: .  
THE ARC OF SOUTH NORFOLK, .  
Employer, . Case No. 01-RC-213174  
and .  
AMERICAN FEDERATION OF STATE, .  
COUNTY & MUNICIPAL EMPLOYEES, .  
COUNCIL 93, .  
Petitioner. .  
.....

**THE ARC OF SOUTH NORFOLK'S REQUEST FOR  
REVIEW OF THE ACTING REGIONAL DIRECTOR'S  
DECISION AND DIRECTION OF ELECTION**

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## **INTRODUCTION**

Pursuant to Section 102.67(c) of the Rules and Regulations of the National Labor Relations Board, The Arc of South Norfolk, Inc. (“The Arc”) respectfully requests that the Board review the determination made in the Acting Regional Director’s Decision and Direction of Election that The Arc’s Program Coordinators are not statutory supervisors. Review is warranted for several of the reasons prescribed in the Board’s Rules and Regulations. *See* Section 102.67(d). First, the Acting Regional Director committed several clearly erroneous factual errors that materially impact the ultimate determination. Second, the Acting Regional Director misapplied reported Board law. Third, to the extent that the Acting Regional Director’s application of prior Board law was correct – which The Arc believes it was not – then such precedent should be reconsidered. These factual and legal errors raise compelling reasons warranting the Board’s review of the decision.

## **BACKGROUND**

### **I. The Arc and Its Organizational Structure.**

The Arc is a private, nonprofit organization that provides supports and services to individuals and their families with developmental and intellectual disabilities. Among other programs, The Arc offers a Day Habilitation Program, which is designed to develop independent living skills for its participants. It operates at two locations: Westwood, Massachusetts and West Roxbury, Massachusetts. A total of 65 employees work in the Day Habilitation Program, which is overseen by Director Lisa Knox (“Knox”). (Tr. 14, 21.) Two Senior Associate Directors, one for the Westwood location and another at the West Roxbury location, assist Knox with her duties and oversee the clinical aspects of this program. (Ex. E-1, Tr. 17-18.) Each participant in the program is assigned to a Group Room, each of which includes about 10 to 14 participants with similar levels of functioning and support needs. A Program Coordinator is assigned to each

Group Room and is responsible for the day-to-day activities that take place in the Group Rooms. Each Program Coordinator, in turn, supervises a staff of two or more Case Managers or Assistant Case Managers. (Tr. 258 (“Q. Okay. ‘Each program coordinator supervises staff of two or more case managers or assistant case managers.’” A. It’s true.”.)

Typically, the Program Coordinator and Case Managers have a case load of four to six participants. (Tr. 23.) The Program Coordinator for each Group Room is responsible for assigning caseloads to Case Managers. (Tr. 24.) The Program Coordinator and Case Managers are both responsible for helping assigned participants work toward goals specified in the participants’ service plans, documenting their progress against objective criteria, and with personal care, such as toileting and feeding. (Ex. E-2, Tr. 21-24.) Case Managers generally assume greater responsibility for personal care matters. (Ex. E-2.) Assistant Case Managers do not have assigned caseloads and provide support as needed through the Group Room. (Ex. E-3.) They assist primarily with personal care and do not have documentation responsibilities. (Ex. E-3, Tr. 27-28.) Finally, The Arc has a number of Relief Staff who float to different Group Rooms to cover Case Managers and Assistant Case Managers who are absent. (Ex. E-4, Tr. 29-30.) Case Managers, Assistant Case Managers, and Relief Staff all report to the Program Coordinators. (Tr. 25, 29, 32, Ex. E-2, E-3, E-4.)

Each Program Coordinator is responsible for their Group Room. (Tr. 33, 46.) It is the Program Coordinator’s responsibility to lead the team of Case Managers, Assistant Case Managers, and Relief Staff in meeting the needs of the program participants. (Tr. 33, 46.) They coordinate activities and oversee the day-to-day operations of their rooms. (Tr. 33.)

## **II. The Program Coordinators' Authority.**

### **A. Hiring.**

Program Coordinators have a central role in the hiring of staff for their Group Rooms. Although they do not necessarily participate in the initial screening interview, which usually is conducted by Knox, and the Senior Associate Director, Diane DeMeritt ("DeMeritt"), applicants who pass the initial interview participate in a "working interview" in the Group Room to which they are applying with the Program Coordinator. Neither Knox nor DeMeritt is present for this part of the interview process, so they are completely dependent upon the observations and views of the Program Coordinator.

After the applicant has spent time in the Group Room, there is a follow-up meeting with the applicant, Knox, DeMeritt, and the Program Coordinator. At the end of this meeting, Knox and DeMeritt ask the Program Coordinator whether he or she wants to hire the applicant for the Group Room. Both Knox and DeMeritt unequivocally stated that they never have hired an applicant over the objection of the Program Coordinator and, provided that the background check does not raise issues, have never refused to hire an applicant that the Program Coordinator wants for his or her Group Room. As DeMeritt testified:

Q. The program coordinator says let's hire the person and that's the decision?

A. Correct.

Q. What happens if the program coordinator says I don't want this person?

A. Then we'll just – one or two things will happen. One is we would just stop with the candidate altogether. Or if we have a room with multiple – another room with vacancies, we may then invite the person back to visit another group room.

Q. Do you recall ever hiring an applicant into a room where the program coordinator said, no, I don't want that person?

A. I can't recall that.

Q. And that's in 25 years.

A. Um-hum.

(Tr. 120.)

In effect, the Program Coordinators make the hiring decisions for their Group Rooms and exercise an absolute veto over hiring decisions. (Tr. 95 (“Q. Do they have a role in the decision? A. They have a role in the interview process and they have the role to stop the hiring of someone. They would be able to veto somebody being hired. Through the process, there will be a point where they will be asked for their input. If they said I don’t like the person. I don’t think they’re an appropriate match. Then the decision would end there and the person would not be hired.”)) No one is hired into a Group Room without the approval of the Program Coordinator, and Knox and DeMeritt, who ultimately have the authority to hire Case Managers for the Day Habilitation Program, effectively have delegated this authority to the Program Coordinators. (Tr. 322 (“A. ... [I]n my experience, I have always approved of ... the people who we’re hiring.” (testimony of Program Coordinator and union witness Ellen Wall); Tr. 348 (“Q. ... [I]n a hiring process you’ve never had somebody forced on you; is that right? A. Right.” (same).))

Similarly with respect to transfers of Case Managers into a Group Room, no one has ever been transferred into a Group Room without the approval of the Program Coordinator for that Group Room. (Tr. 105-06 (“Q. ... Does the program coordinator have veto power to veto a transfer? A. Yes.”; Tr. 122 (“Q. So a program coordinator could veto a transfer into their room if they didn’t want that person? A. Correct, they could, correct.”); Tr. 237 (“A. So, from experience, if the PC – program coordinator does not approve the transfer, it will not take place.” (testimony of Program Coordinator Austin Udemagwuna)); Tr. 273 (“Q. Okay. ... ‘No one is



transferred or [sic] out of a group room without the agreement of the program coordinator for that group room. If the program coordinator objects, the transfer will not occur.’ Is that an accurate reflection of the conditions at the Arc that you’ve experienced or observed? A. Yes.” (testimony of Program Coordinator and union witness Stefanie Furlong).)

The witnesses for the Petitioner did not present any serious evidence that contradicts the testimony of The Arc on this point. The examples they gave all seemed to involve unusual situations which they were not sure involved the hiring of a Case Manager into their Group Room.<sup>1</sup> None of them testified that they had any Case Manager working in their Group Room who they did not want there. Thus, The Arc’s witnesses on this point essentially were unchallenged.

#### **B. Direction of Work and Staff Assignments.**

The Arc’s witnesses also consistently testified that the Program Coordinators oversee what happens in their Group Room. They are the senior staff person in their Group Room as no other senior manager is regularly present. Although the Program Coordinators solicit input from their staff, they ultimately determine what the program and activities are in their Group Room based upon the needs of the clients assigned to their Group Room. (Tr. 290 (“Q. So, what happens if you all can’t agree? I mean, it sounds like you are running your room like – by committee. So, what happens if there’s disagreement among all of you? Does somebody have the ultimate responsibility to make a decision? A. Yes, ultimately. Q. Who? A. Myself.” (testimony of Program Coordinator and union witness Stefani Furlong).) As Case Manager Kurt

Boreri testified:

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<sup>1</sup> Program Coordinator Stefanie Furlong even went so far as to testify that someone who was in her room for a couple of hours on a single day was hired into her room without her approval even though there was absolutely no evidence that he was hired into her room. In fact, the evidence showed that he was hired into a different room.

Q. So, when you say that you have been included in the decision making –

A. Yeah.

Q. – what does that – what does that mean?

A. That the PC will ask for the staff's input and take into consideration their consideration or their feelings and thoughts before making a final decision.

...

Q. So, the staff isn't making any final decisions about the activities?

A. No, because from what I understand, my understanding is the PC doesn't have to – have to do what the case managers want. I mean that's – that's the whole point of the position. They can overrule the case managers, but a good manager, a good PC will – will always ask for staff input.

(Tr. 251-252.)

Similarly, the Program Coordinators assign each of their Case Managers a caseload which they have the authority to change. (Tr. 98 (“Q. Within the group room, all right, who assigns the caseload to the case managers? A. The program coordinator.”; Tr. 128-29 (“Q. Are staff assignments ever changed within a group room? A. They can be, yes. ... Q. Is there a process for a change being made? A. The program coordinator would make that change. Q. Does the program coordinator need approval from anyone else to make that change? A. No. The program has the – program coordinator has the authority to make that change.”.) Austin Udemagmuna, a Program Coordinator, testified that he just did that with a new Case Manager, Genevie Barco, and that his decision about her case load was final. And he testified in detail as to the discretion he exercises in assigning caseloads:

Q. What criteria do you use in making the match?

A. Personally, the criteria that I use is I look at the – the skills and experience of the new staff and see if she's capable of handling, dealing with especially the guardian or the parent that I'm assigning her to.

If I see that the guardians or the parent of the individual are very, very demanding, I do want to handle that because I'm already – I've already established a relationship with the parent or the guardian. So, the preference – I mean the criteria that I use is to make sure she's able to relate with the – with the guardian or the parent of the individual.

Q. So, these are all very individualized decisions?

A. Correct.

Q. And some – I take it that some guardians and parents can be more difficult to manage than others?

A. Yeah, right.

Q. So, you're – you're making a determination whether that case manager could handle that situation?

A. Right.

Q. Some can? Some can't?

A. Some can't, yeah.

Q. When you assigned Genevieve her caseload, did you need anybody's approval –

A. No.

Q. – as to those assignments?

A. No. There was no influence from any other – any person at all.

(Tr. 204-205.) He also testified that when he was a Case Manager before being promoted to a Program Coordinator, each of the three or four Program Coordinators he worked under over the years assigned him his caseloads. (Tr. 206.)

Kurt Boreri, a Case Manager from a different Group Room, similarly testified that the Program Coordinators he has worked under assigned him his caseloads. (Tr. 245 (“Q. Who assigned you your caseload? A. Meryl [a Program Coordinator]. Q. What about when you were working at the Arc in 2010, did you have a caseload? A. Yes. Q. And did somebody

assign you your caseload – A. Yes. Q. – then? A. Yes. Q. Who? A. Then PC Karina.”). This was supported by Knox and DeMeritt.

DeMeritt in particular testified that although she puts a letter in each client’s file documenting who their Case Manager is, this is merely an administrative step that is required by state regulation. (Tr. 127 (“Q. Who makes the assignment of the participant to a case manager? A. The program coordinator makes the assignments of caseloads. I will then get a list of those assignments so that that information can be entered into our database. Then a form letter is drafted as according to our regulations.”.) Clearly the Program Coordinators exercise the authority to assign the caseloads to their Case Managers, and their decisions are not subject to approval or veto by more senior management. (Tr. 127-28 (“Q. Does the program coordinator’s decision with respect to a staff assignment of a case require the approval of anyone other than the program coordinator? A. No, it does not. Q. Has it ever? A. No, it never has.”))

The Program Coordinators also decide which staff person in their Group Room will oversee each activity that occurs in the Group Room based on their assessment of the skills of their staff. None of their decisions require approval from more senior management. (Tr. 209 (“Q. So, the assignment of activities, you have the final say? A. I have the final say.”).) As Austin Udemagmuna’s testified, “I fashion the program for the day, but they help to implement those programs.” (Tr. 192.)

Finally, it was clear from the testimony that the Program Coordinators must use independent judgment in making decisions about assigning caseloads and determining what programs and activities will take place in their Group Room. (Tr. 261 (Q. “Sure. ‘It is the responsibility of the program coordinator to assess the needs of each participant in the group room and to decide staff assignments and what activities are appropriate.’ A. Yes.” (testimony

of Program Coordinator and union witness Stefani Furlong); Tr. 245 (“Q. Okay. Who decides what activities take place in your group room? A. Ultimately, it’s the program coordinator.” (testimony of Case Manager Kurt Boreri).) As everyone agreed, each Group Room is different because the clients are different. Some Group Rooms have highly functioning clients and some have very low functioning clients. This necessitates that the programs and activities be tailored to the needs of the particular clients in the Group Room. (Tr. 112 (“Q. Are the programs and activities in alt day A, B, and C different from the programs and activities in group 7? A. All the group rooms, their programs and activities are different. The program and activities are set up and designed by the program coordinator.”) This is the Program Coordinator’s responsibility, and they must make judgments in designing their program, selecting activities and assigning staff responsibilities for clients and activities. (Tr. 337 (“Q. Give me an example of something that you have the authority to decide. A. I think I do kind do [sic] decide for what we’re doing for activities in the room.” (testimony of Program Coordinator and union witness Ellen Wall.)

### **C. Discipline.**

The Arc has a progressive discipline policy. (Tr. 51-70; Ex. P-2 at 11-13.) Under this policy, Knox and DeMeritt testified that Program Coordinators must initiate all discipline and terminations since senior management do not know about performance problems or misconduct involving Case Managers unless the Program Coordinator brings it to their attention. (Tr. 133-134; 170-172.) They rely upon the information the Program Coordinator provides.

Program Coordinators have the authority, which they have exercised regularly, to provide informal feedback to staff about performance problems or misconduct and provide verbal warnings and counseling or training. They make the decision to do so independently and without approval from more senior management.

They also independently conduct “documented supervisions” with their staff without approval of senior management. (Ex. E-11, E-12, E-13, E-14, E-15, E-16(a), E-16(b), E-17, E-18, E-19.) This is a more formal level of discipline.

Although they don’t have the independent authority to issue written warnings or terminate an employee, the Program Coordinators initiate that level of the progressive discipline process by bringing the issue to Knox or DeMeritt. Neither Knox nor DeMeritt make an independent investigation into the facts underlying potential discipline but instead rely on the Program Coordinators. The Program Coordinators make a recommendation regarding further discipline or termination, participate in the decision-making process, sign written warnings, and participate in discipline meetings where warnings are delivered and in termination meetings. (Tr. 171-172 (“Q. Do program coordinators have any involvement in termination decisions? A. In the decision, yes. Q. What’s their role? A. Offering the detail, the work that they’ve done, their observations, their judgment, and we absolutely take their recommendation into consideration. ... Q. You say exclusively by the program coordinator. It would never be initiated by you, or Diane, or someone else? A. We’re relying on their judgment, and their observations, and their experiences. So, no, that recommendation wouldn’t come from us. It wouldn’t, no, it would come from the program coordinator.”).)

#### **D. Compensation.**

Program Coordinators are salaried, exempt employees, like more senior management, and are paid about \$6,000 more per year than Case Managers. (Tr. 34, 336.) Case Managers are hourly, non-exempt employees. (Tr. 24.)

#### **E. Treated As Supervisors By the Employer and Staff.**

As testified by Kurt Boreri, a Case Manager, the Program Coordinators are viewed by the staff in their Group Rooms as having the final say about what happens in the Group Room. (Tr.

245-246, 251-252.) They are the boss. When the staff have meetings in the Group Room, the Program Coordinator decides when to hold the meeting, determine the agenda and conduct the meeting. (Tr. 163, 164.)

Program Coordinators also have separate meetings with senior management to discuss program-wide issues that affect all of the Group Rooms and to share information about what activities are effective or not. (Tr. 164-165.) They are the conduit for communicating this information to their staff.

When The Arc held a management training program, the Program Coordinators participated in the training program along with senior management. (Tr. 49-51; Ex. E-10.) Case Managers were not included in the training program. (Tr. 50.)

Similarly, when The Arc needed to eliminate a Group Room, it sought input from the Program Coordinators and in the end adopted the consolidation plan proposed by the Program Coordinators. (Tr. 35-46; Ex. E-6, E-7, E-8.) The Program Coordinators also were intimately involved in redistributing both clients and staff. Case Managers had input into this process only through their Program Coordinator.

The Program Coordinators clearly are viewed by both The Arc and the day habilitation program staff as part of management with significant authority to make decisions that affect the working conditions of the staff and the operations of The Arc. The Program Coordinators even refer to themselves as “supervisors” when signing off on time off requests, performance evaluations, and community outing approval forms. (Ex. E-22(a)-E-22(f)), E-23-E-26, Ex. E-27(a)-E-27(e).) Contrary to the testimony of the Petitioner’s witnesses, they are not just another Case Manager in their Group Room who simply leads discussions by the staff in order to reach group decisions.

### **III. The Petition and the Acting Regional Director's Decision.**

Petitioner filed a petition seeking to represent a bargaining unit consisting of all relief staff, assistant Case Managers, Case Managers, Licensed Practical Nurses, Physical Therapy Assistants, and Program Coordinators. Because of the extensive supervisory authority possessed by the Program Coordinators, The Arc sought to exclude them from the bargaining unit based on their role in the hiring, assignment and direction of the work of their subordinates, and their role in discipline.

Nevertheless, the Acting Regional Director found the Program Coordinators not to be supervisors. The Acting Regional Director's decision is premised on three fundamental flaws. First, the Acting Regional Director disregarded almost all of the evidence showing that Program Coordinators are supervisors and, instead, pointed out purported exceptions testified to by the Petitioner's witnesses that in actuality prove the rule. Second, the Acting Regional Director misapplied Board (and Supreme Court) law regarding "effective recommendation" of supervisory authority, ruling instead that the recommendations must be "binding" to be "effective" even though that interpretation of Section 2(11) reads the "effectively ... recommendation" provision out of the statute. Third, the Acting Regional Director held that the Program Coordinators did not possess supervisory authority because he believed that The Arc had not provided enough examples that of the exercise of that authority, thereby conflating the possession of authority with its exercise.

## **ARGUMENT**

### **I. The Standard.**

Only "employees" have the right to bargain collectively under federal law. 29 U.S.C. § 157. The Act defines the term broadly (and somewhat circularly, *see id.* § 152(3) ("shall include any employee ...")), but excludes "any individual employed as a supervisor," *id.* A "supervisor"



is any individual who, while acting in the interest of the employer, uses independent judgment to carry out any one of the enumerated job tasks listed in Section 2(11).<sup>2</sup> 29 U.S.C. § 152(11). The Act thus creates “a three-part test for determining supervisory status.” *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712–13 (2001). Individuals are supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” 29 U.S.C. 152(11); *see Kentucky River*, 532 U.S. at 713. An individual only needs to possess *one* of the twelve listed indicia to be a supervisor (so long as the other two elements of the statutory test are satisfied). *See, e.g., Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007) (“An individual need possess only one of the enumerated indicia of authority in order to be a statutory supervisor, so long as the exercise of such authority is carried out in the interest of the employer and requires the use of independent judgment.”); *Extreme Bldg. Servs. Corp. & Local 78, Asbestos Lead & Hazardous Waste Union, Laborers Int’l Union of N. Am.*, 349 NLRB 914, 918 (2007) (“The exercise of authority requiring independent judgment with respect to any one of the actions specified is sufficient to confer statutory supervisory status.”); *Local One, Int’l Union of Elevator Constructors of N.Y. & N.J.*, 339 NLRB 977, 981 (2003) (“The exercise of authority requiring independent judgment with respect to any one of the actions specified is sufficient to confer statutory supervisory status.”); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649

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<sup>2</sup> Section 2(11) of the NLRA defines the term “supervisor” as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11).

(2001) (“To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend, as long as the performance of that function is not routine but requires the use of independent judgment.”); *Entergy Sys. & Serv., Inc.*, 328 NLRB 902 (1999) (“The statutory language is disjunctive, and the exercise of any one of the listed indicium is sufficient to make that individual a supervisor.”); *Queen Mary*, 317 NLRB 1303 (1995) (“Section 2(11) is phrased in the disjunctive. Thus, the exercise of authority (requiring independent judgment) with respect to any one of the actions specified is sufficient to confer statutory supervisory status.”); *Allen Servs. Co., Inc.*, 314 NLRB 1060, 1061 (1994) (“The statutory indicia set forth above are in the disjunctive and only one need exist to confer supervisory status on an individual.”); *Opelika Foundry*, 281 NLRB 897, 899 (1986) (“The statutory indicia outlined above in Section 2(11) of the Act are in the disjunctive and only *one* need exist to confer supervisory status on an individual.” (emphasis in original)); *Albany Med. Ctr.*, 273 NLRB 485, 486 (1984) “the statutory indicia set forth in Section 2(11) of the Act are stated in the disjunctive and only one need exist to confer supervisory status”).

Furthermore, when carrying out an analysis of whether an employee possesses supervisory authority, “the question of supervisory status is determined by whether or not the individual possesses supervisory authority, not by whether or not the individual *exercises* such authority.” *Formco, Inc.*, 245 NLRB 127, 129 n.7 (1979) (emphasis in original). *See also Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007) (“Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise.”); *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999) “(we do not draw a distinction between those account representatives who in fact have exercised their authority to discharge and those who have not; the determinative factor is that all such account representatives possess the

authority to do so”); *Wasatch Oil Refining Co.*, 76 NLRB 417, 423 fn. 17 (1948) (“The Board has held that employees with acknowledged supervisory authority may be found to be supervisors although they have never exercised such authority.”).

Where these qualifications are met, then the individuals must be found to be statutory supervisors under the Act; as such, they are ineligible for representation, and cannot be included in any certified unit for purposes of collective bargaining.

## **II. The Acting Regional Director Erred in Finding that Program Coordinators Do Not Possess the Authority to Effectively Recommend Hiring.**

The Acting Regional Director found that Program Coordinators do not effectively recommend the hiring of Case Managers because, according to the Acting Regional Director, “[t]he weight of the evidence establishes that program coordinators role in the hiring of case managers falls short of effectively recommending that a person be hired” because one witness testified that one Case Manager was hired over her objection. (Decision at 20.) This finding does not withstand scrutiny because against this one vignette, the record abounds in evidence that Program Coordinators in fact have authority to effectively recommend the hiring of Case Managers.

Since no one is hired into a Group Room without the approval of the Program Coordinators, the Region need not have gone further to find that the Program Coordinators are supervisors. *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114 (2007), *Berger Transfer & Storage*, 253 NLRB 5 (1980), *Detroit College of Business*, 296 NLRB 318 (1989), and *HS Lordships*, 274 NLRB 1167 (1985), each show why. In *Starwood Hotels*, the Board held that a front desk supervisor possessed supervisory authority because the employer would not hire an employee for whom the supervisor gave a negative hiring recommendation and, therefore, the supervisor had the authority to effectively recommend against hiring a candidate. 350 NLRB at

1118. Similarly, in *Berger Transfer & Storage*, the Board found a salesman to be a supervisor where the salesman's recommendation against hiring a candidate was normally final. 253 NLRB at 10. The Board came to the same conclusion in *Detroit College of Business*, where the Board held that department coordinators had the authority to effectively recommend hiring where no instructor had ever been hired without the consent of a department coordinator. 296 NLRB at 319. Finally, in *HS Lordships*, the Board found a bar manager to be a supervisor where the manager's recommendations not to hire an applicant were followed. 274 NLRB at 1173.

The result should be no different here. The evidence introduced at the hearing is clear that the Program Coordinators effectively make the hiring decisions for their Group Rooms and have the authority to exercise an absolute veto over hiring decisions. Aside from the one instance testified about by one of the Petitioner's witnesses, no one is hired into a Group Room without the approval of the Program Coordinators, and Knox and DeMeritt, who ultimately have the authority to hire Case Managers for the Day Habilitation Program, effectively have delegated this authority to the Program Coordinators as they testified that they have never hired someone to work in a Program Coordinator's Group Room without that Program Coordinator's approval. The fact that the Program Coordinators have the unilateral authority to veto a hire should itself have been dispositive of whether they are Section 2(11) supervisors. That is a duty clearly enumerated in Section 2(11), and clearly defines Program Coordinators as statutory supervisors. Furthermore, the record is clear that Program Coordinators have the authority to exercise this veto power without approval or consultation with upper management and have done so. Accordingly, on this basis alone they should be excluded from the bargaining unit.<sup>3</sup>

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<sup>3</sup> The Acting Acting Regional Director's suggestion that Program Coordinators are not supervisors based on their role in the hiring process because of the role that Knox and DeMeritt also play is without merit. The Board reached a different conclusion in *Sheraton*, above, and

The fact that there was one instance where a Case Manager may (or may not) have been hired over the objection of one Program Coordinator, Stefanie Furlong, does not change this result. In the first instance, the Acting Regional Director's apparent belief that recommendations must always be binding is in direct conflict with Section 2(11), which mandates exclusion from the coverage of the Act for individuals who "effectively ... recommend," not merely those who pass on the recommendations. No less an authority than the Supreme Court so held in *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 684 n.17 (1980) ("The statutory definition of 'supervisor' expressly contemplates that those employees who 'effectively ... recommend' the enumerated actions are to be excluded as supervisory. 29 U.S.C. § 152(11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority."). If hiring recommendations must always be followed, as the Acting Regional Director appears to believe, then the "recommendation" is not so much a recommendation than it is the actual decision. Yet if an individual's recommendations must be treated the same as the actual decision in order for the recommendation to be "effective," then the "effectively ... recommend" language in Section 2(11) is surplusage. Indeed, the "effectively recommend" language in Section 2(11) contemplates review by some higher authority; namely, the higher authority to whom the recommendation is made. *See id.* The Acting Regional Director's contrary holding is especially troubling given that the Board held in *Detroit College of Business*, 296 NLRB 318, 319 (1989), that coordinators had the supervisory authority to recommend hiring even though two hiring recommendations were not followed.

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*Detroit College of Business*, above, where the participation of admitted supervisors in the hiring process did not detract from the supervisory status of the disputed individuals. Indeed, in *Detroit College of Business*, department coordinators effectively recommended hiring of instructors when they participated in interviews with an associate dean, hiring decisions were made jointly, and no instructor had ever been hired without the consent of a coordinator. That holding cannot meaningfully be distinguished from the facts presented here.

But a more fundamental flaw in the Acting Regional Director's decision that Program Coordinators lack the authority to effectively recommend hiring is that it disregards all of the evidence that Program Coordinators actually have that authority. "When the Board purports to be engaged in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998). As such, the Board (and the Acting Regional Directors to whom the Board has delegated its authority for representation case hearings) is mandated to draw all inferences suggested by the facts. And not only "must" the Board do so, but that drawing such inferences is the Board's "obligation." *Id.* Here, the Acting Regional Director disregarded the testimony of Daniel Sullivan, Diane DeMeritt, Lisa Knox, Ellen Wall, and Austin Udemagwuna that Program Coordinators possess effective hiring authority. Simply put, there is no reason to privilege the one instance about which Stefanie Furlong testified over the consistent testimony of just about every other witness at the hearing.

The only conclusion to draw from the Acting Regional Director's decision is that while purporting to apply a preponderance of the evidence standard, he actually applied a higher standard. *See Oakwood Health Care, Inc.*, 348 NLRB at 694 ("The party seeking to prove supervisory status must establish it by a preponderance of the evidence."). This is impossible to square with *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). There, the Court relied on the Administrative Procedure Act, 5 U.S.C. § 706, as a basis for invalidating the Board's decision-making approach where the Board relied on decisions that consistently applied one standard despite stating that it was applying a different standard and rejecting "the Board's allegedly systematic undervaluation of certain evidence, or allegedly systematic exaggeration of

what the evidence must prove.” *Id.* at 378. The Court explained that the APA “establishes a scheme of ‘reasoned decision-making,’” which means that “[n]ot only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.” Accordingly, the Court held, the requirement of reasoned decision-making dictated that the standard announced must be the same as the standard actually applied:

It is hard to imagine a more violent breach of that requirement [of reasoned decision-making] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly mend it.

*Id.* at 374. Yet this is precisely what the Acting Regional Director did: claim to apply a preponderance of the evidence standard while actually applying a greatly heightened standard.<sup>4</sup>

### **III. The Acting Regional Director Erred in Finding that Program Coordinators Lack Authority to Assign and Direct the Work of Their Subordinates.**

Nevertheless, even if the Acting Regional Director permissibly discounted the ability of the Program Coordinators to hire Case Managers, the Acting Regional Director’s conclusion that Program Coordinators do not possess the statutory authority to assign or responsibly direct the work of their subordinates is wrong. The Acting Regional Director’s reasoning was two-fold. First, he found that there was no evidence that Program Coordinators were accountable for their

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<sup>4</sup> Under the required burden of proof, The Arc was only required to present more evidence confirming the supervisory authority of the Program Coordinators than was presented to demonstrate otherwise. In short, The Arc was required to present evidence that it was more probable than not that its Program Coordinators were supervisors. However, one only need review the Acting Regional Director’s decision to notice the failure of the Acting Regional Director to explain why the evidence relied upon outweighed the evidence to the contrary. Rather, the Acting Regional Director appears to have required “clear and convincing” evidence or evidence establishing “beyond a reasonable doubt” that the Program Coordinators were supervisors.

direction. Second, he believed that the Program Coordinators did not exercise independent judgment. Neither justification fits the facts of what the Program Coordinators actually do.

The record is uncontested that the Program Coordinators oversee everything that happens in their Group Room and assign and direct the work of Case Managers in the process. According to the Board, the term “assign” is the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee.” *Oakwood Health Care, Inc.*, 348 NLRB 686, 689 (2006). However, in assigning duties, an individual must do more than make “ad hoc instruction that the employee perform a discrete task.” *Id.* Instead, the individual must have the authority to designate “significant overall duties to an employee,” thereby affecting the terms and conditions of his or her employment. *Id.* In *Oakwood Healthcare*, the Board found that certain nurses met the statutory definition of “assigning” work because they made assignments tailored to patient conditions and needs and particular nurses’ skills, among other factors. They also gave the employees specific instructions, which included “significant overall tasks to an employee.” In light of this, the Board reasoned that those decisions had a material effect on the terms and conditions of staff employment, and the “assignment” prong was satisfied. *Id.* at 695.

Program Coordinators have the same type of assignment authority as the nurses in *Oakwood Healthcare*. Repeated testimony demonstrated that the Program Coordinators assign each of their Case Managers a caseload, based on their perception of their Case Managers’ levels of experience and skills, and client needs. Moreover, Program Coordinators ultimately determine what the program and activities are in their Group Room and also decide which staff in their Group Room will oversee particular activities in the Group Room. And, notably,



Program Coordinators make these determinations based on their own perception of the needs of the clients assigned to their Group Room and the best way to implement the clients' rehabilitation plans so that the clients can achieve the goals set forth in those plans. In all, the Program Coordinators assign the staff in their Group Rooms to particular tasks, and delegate the staff to individual assignments. By making these assignments, the directives of the Program Coordinators have an obvious material effect on the terms and conditions of their staff's employment – indeed, the Program Coordinators effectively determine what the staff in their Group Rooms will do all day. As such, the manner in which the Program Coordinators assign their staff to particular clients and duties based on a Program Coordinator's assessment of the proper pairing of his or her staff's experience, skills, and aptitude with the needs of the program participants has the effect of providing the staff with “significant overall tasks” on a daily basis. Thus, in light of the Board's reasoning in *Oakwood Healthcare*, the Program Coordinators' authority constitutes “assignment.”<sup>5</sup>

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<sup>5</sup> Indeed, in *Oakwood Healthcare*, the Board said the following regarding “assignment” under Section 2(11):

The power to assign an employee to one or the other is of some importance to the employee and to management as well. Certainly, in the health care context, the assignment of a nurse's aide to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee. It may also have a bearing on the employee's opportunity to be considered for future promotions or rewards. From the employer's perspective, matching a patient's needs to the skills and special training of a particular nurse is among those factors critical to the employer's ability to successfully deliver health care services.

*Id.* at 689. Certainly, the same can be said about the judgment used by Program Coordinators. After all, “matching a [client's] needs to the skills and special training of a particular [Case Manager] is among those factors critical to the employer's ability to successfully deliver [day rehabilitation] services.” *Id.*

The Program Coordinators also responsibly direct the staff in their Group Rooms. “Direction” of employees, unlike assignment, “may encompass ad hoc instruction to perform discrete tasks.” *Id.* at 689-690. Thus, “[i]f a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it,” then the person is “directing” others under Section 2(11). *Id.* at 691. Mere “direction” of employees will not qualify an individual as a “supervisor.” The individual must “responsibly” direct employees. In order to be “responsible,” the supervisor must be accountable and must have the ability to take corrective action when necessary. Also, there must be the prospect of adverse consequences for the supervisor because of the direction. Thus, if employees fail to perform their delegated duties, the supervisor must face meaningful consequences.

As to whether the Program Coordinators “responsibly direct” the work of their staff, the Board’s analysis in *Oakwood Healthcare* again is instructive. There, the Board held that:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

*Id.*

There is no question that, under the facts of this case, this portion of the Board’s analysis is satisfied. The Program Coordinators have clearly been given the responsibility for delegating work to their staff and to direct the staff in their daily tasks. Moreover, the record reveals that the Program Coordinators are ultimately responsible for the actions of the staff under their supervision. Although the Acting Regional Director claimed that Program Coordinators were not responsible in the requisite sense because “the Employer provided only one example of a program coordinator suffering an ostensibly adverse consequence for case managers’ performance” (Decision at 7), that one instance is more than sufficient. Indeed, in this case, as

the Acting Regional Director recognized, the Program Coordinators' responsibility does not just create a "prospect of adverse consequences;" those consequences are quite real, and have, in fact, been imposed when a Program Coordinator failed to properly supervise her staff. But even putting aside that evidence, the standard is not whether The Arc presented evidence of actual consequences (which it did) but whether The Arc presented evidence of a prospect of adverse consequences (which it also did). (Tr. 218 ("Q. All right – and why do you believe you're held accountable? A. Because everything that happen in my group room I'm answerable to it. Whether it's by omission or commission from any of the staff, you know, if they don't do their job, I'm answerable – I'm held accountable for – for it." (testimony of Program Coordinator Austin Udemagwuna)).) A showing of accountability requires only a showing of "a *prospect* of consequences," and not a showing of *actual* consequences as erroneously mandated by the Acting Regional Director. *Golden Crest*, 348 NLRB 727, 731 (2006) (citing *Oakwood Health Care*, 348 NLRB 686, 692 (2006).) Accepting the Acting Regional Director's decision that Program Coordinators are not responsible because there was only one instance of a Program Coordinator suffering adverse consequences would have the bizarre result that only individuals who otherwise perform the supervisory function of directing subordinates and are bad at their jobs will be considered statutory supervisors while those that perform their supervisory functions well will not be so considered. And, in any event and contrary to the Acting Regional Director's assertions, The Arc's evidence established that a Program Coordinator who fails to perform his or her supervisory duties over the staff is subject to discipline. There was no contrary evidence. Simply put, the Program Coordinators are held accountable for the direction they provide. Accordingly, there can be no dispute that the Program Coordinators responsibly direct their staff.

Turning to the final elements of the analysis, and again contrary to the Acting Regional Director, the record clearly demonstrates that the Program Coordinators exercise independent judgment in performing their daily tasks, and that these tasks are not “rote” or routine in nature. To the contrary, the record shows that the Program Coordinators’ discretion is an integral part of the success of their Group Rooms and that their ability to assign roles and delegate duties is a critical part of their responsibilities each day.

According to the Board, there are two essential criteria of independent judgment: first, the individual must exercise that judgment without external control, and second, the individual must exercise judgment beyond that which is only routine and clerical. *Oakwood Health Care*, 348 NLRB 686, 692-694 (2006). In order for judgment to be beyond external control, at a minimum, a supervisor must act free from the control of others, and must be able to form an opinion “by discerning and comparing data.” *Id.* at 693. Judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* The presence of a policy, however, is not necessarily determinative. The real question is whether the policy allows for discretionary choices, or whether it removes the discretion from the individual’s control. *Id.*

In the instant case, and despite the Acting Regional Director’s belittling of the judgment they exercise, the Program Coordinators easily meet the Board’s statutory test. They make daily assignments for the staff under their control and have the unilateral authority to remove their subordinates from an existing assignment whenever required. They assign duties based on their own judgment and perception of fairness, and without regard to any established rotation or method. When faced with misconduct, Program Coordinators are authorized to use their own

discretion in whether to provide informal feedback to staff about performance problems or misconduct and provide verbal warnings and counseling or training, or to conduct a “documented supervision,” which is a more formal level of discipline. They make these decisions independently and without approval from more senior management. Indeed, senior management is not even present in the Group Rooms except rarely, which further attests to their independence.. *See Mon Valley United Health Servs.*, 238 NLRB 916, 925 (1978) (“The parties did not reach agreement, however, regarding the supervisory status of the two resident managers in the Residential Living Program. The Employer contends that they are supervisors within the meaning of the Act, while the Petitioner avers that they are not. ... The fact that the program director normally is in his office during the day, while the majority of the activity in the homes occurs in the evening, further attests to the independent nature of the judgment exercised by the resident managers. Although the program director visits the homes several times a week, it is clear that he does not directly supervise the assistants in the performance of their duties. We, therefore, conclude that the resident managers are statutory supervisors and shall exclude them from the unit.”) Their recommendations as to hiring, terminations, and evaluations are followed overwhelmingly, and management relies heavily on the Program Coordinators in making such determinations. They are expected to resolve employee grievances; they provide training to the staff; and, finally, they are held directly responsible for the actions of the staff they supervise, and their failure to adequately oversee or delegate could result in their own significant material harm, including being placed on a performance improvement plan, as the evidence showed that one Program Coordinator had been so disciplined. These tasks are not routine; they involve the Program Coordinators’ own discretion, his or her understanding of the functioning of their Group Rooms, and his or her ability to assess the needs of the clients in their Group Rooms and the

activities best suited to help the clients achieve their goals on a daily basis. The only way that the Acting Regional Director could have found otherwise is to focus on the admittedly rote tasks that Program Coordinators designate (such as toileting) and to ignore the evidence on how the Program Coordinators formulate, design, and implement activities to help program participants meet the goals prescribed in their service plans. And that is exactly what the Acting Regional Director in this case did, indeed, going so far as to claim despite all of the evidence to the contrary that “[a]ssigning Case Managers to participants ... does not require an analysis of a given Case Managers’ skill set relative to the participant once both are already assigned to the room in question” (Decision at 12) despite the un rebutted evidence that the assignment of caseloads is based not only on the participants’ needs but also on a Case Manager’s fit with a particular participant’s guardian. And, because the Program Coordinators exercise this significant authority in order to ensure that their Group Rooms run smoothly and successfully, there can be no question that these individuals act in the interest of the employer, as well.

In all, the bulk of the evidence presented at the hearing showed the numerous decisions that the Program Coordinators must make on a daily basis. Whether the Program Coordinator is assigning a client to a particular Case Manager or a staff member to a particular task, determining which staff will perform specific activities, or determining what activities will occur in his or her Group Room on any particular day, there are an enormous number of competing interests that must be resolved. Indeed, the fact that the Program Coordinators are held accountable for their supervision further underscores how important their exercise of independent judgment actually is – when a Program Coordinator receives discipline or is placed on a performance improvement plan relating to her direction of a staff member, this reflects that the Program Coordinator failed to exercise the independent judgment necessary to properly

supervise her subordinates. Accordingly, there can be no question that the Program Coordinators exercise independent judgment in performing their jobs – and, as such, they must constitute statutory supervisors under the Act and must be excluded from any unit found appropriate.

#### **IV. The Acting Regional Director Erred in Finding Program Coordinators Are Not “Supervisors” Despite Their Role in Discipline.**

Although the Acting Regional Director specifically admitted that Program Coordinators initiate the disciplinary process through issuing supervision notes, escalate issues that are not resolved after an employee receives a supervision note to subsequent steps in The Arc’s progressive discipline process, and give recommendations regarding discipline that are given “significant weight,” the Acting Regional Director nevertheless rejected the Program Coordinators’ supervisory authority to issue discipline or effectively recommend discipline because, as the Acting Regional Director would have it, “insufficient evidence exists on the record of a Program Coordinator’s supervision notes or recommendations having a binding impact on future disciplinary action against a Case Manager or her job status.” (Decision at 18.)

Again, the Acting Regional Director’s conclusion misconstrues applicable law under Section 2(11) and disregards the undisputed authority of the Program Coordinators to issue and effectively recommend discipline. The fact that the record does not show that supervision notes automatically lead to further discipline or that Program Coordinators’ recommendations are not binding is irrelevant – the sole inquiry for purposes of Section 2(11) is whether or not the Program Coordinators could issue written counseling to their subordinates that initiated the applicable progressive disciplinary process. Employer’s Exhibits 11, 12, 13, 14, and 15 confirm that Program Coordinators did in fact issue supervision notes to Case Managers.

It is well settled that written counselings are discipline, regardless of whether or not the written counseling results in future disciplinary action. As the Board has previously held, a

warning need not “*automatically* lead[] to an action affecting employment.... [I]t is sufficient that the discipline has the real potential to lead to an impact on employment.” *Progressive Transp. Servs. Inc.*, 340 NLRB 1044, 1046 (2003). The Board also has explained that write-ups are a form of discipline where they “lay a foundation, under [a] progressive disciplinary system,” for later personnel action, such as suspension or termination. *Oak Park Nursing Care Ctr.*, 351 NLRB 27, 28, 29 (2007). Generally, where an employer maintains a defined progressive discipline policy, and cited violations of company policy count toward the number of missteps permitted before termination, those with independent authority to issue the citations are supervisors. See, e.g., *Concourse Vill., Inc.*, 276 NLRB 12, 13 (1985); *Waverly–Cedar Falls Health Care*, 297 NLRB 390, 392 (1989); *Ohio Masonic Home*, 295 NLRB 390, 393–94 (1989); *Passavant Health Ctr.*, 284 NLRB 887, 889–90 (1987).

Here, the issuance of written discipline becomes a part of the employee’s personnel history and could lead to further and more serious discipline, depending upon the employee’s response to the write-up. Moreover, while all Program Coordinators possess the authority to discipline their subordinates, some Program Coordinators choose not to exercise this authority. Program Coordinators have the discretion to decide whether to ignore improper conduct, verbally counsel an employee, educate an employee, or issue written discipline in the form of a supervision note. There is no book or set of guidelines to instruct a Program Coordinator when a particular activity engaged in by a subordinate rises to the level of a disciplinary situation – it is in the Program Coordinator’s judgment as to whether his or her subordinates are meeting their job responsibilities and they are ultimately responsible for their subordinates’ performance. Some Program Coordinators may choose to ignore particular conduct, whereas another Program Coordinator may find that the same conduct rises to the level of a discipline situation. Thus, two



Program Coordinators observing the same conduct may choose two different courses of action. This is supervisory authority under Section 2(11). *See Oak Park Nursing Care Ctr.*, 351 NLRB 27, 29 (2007) (“Moreover, the LPNs here have the discretion to document employee infractions on the counseling forms. In this respect, the LPNs alone decide whether the conduct warrants a verbal warning or written documentation. Because the LPNs here have the discretion to write-up infractions on employee counseling forms, we believe that they are vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee.”).

Significantly, all Program Coordinators are vested with the authority to make the fundamental decision, using their own independent judgment, whether to commence the formal disciplinary process by either themselves filling out a supervision note, or going to Knox or DeMeritt for instruction. Although it is true that Program Coordinators do not have the independent authority to issue written warnings or terminate an employee, it also is true that Program Coordinators initiate that level of the progressive discipline process by bringing issues to Knox or DeMeritt, make recommendations regarding further discipline, participate in disciplinary decisions, sign written warnings, and participate in meetings where discipline is meted out. Since senior management does not know about performance problems or misconduct involving Case Managers unless the Program Coordinator brings it to their attention, senior management relies upon the information the Program Coordinator provides in making further disciplinary decisions. The existence of this authority was confirmed by every witness who testified at the hearing (albeit only after significant prodding of the Petitioner’s witnesses). There was simply no evidence presented to show that this authority does not exist. Nor is there any evidence that senior management has ever conducted any independent investigation instead

of relying solely on the information provided by Program Coordinators. While Program Coordinators may not play a determinative role in the final determination regarding discipline, as discussed above in relation to the Program Coordinators' effective hiring recommendations, the relevant consideration for purposes of Section 2(11) is effective recommendation, not final authority lest the words "effectively ... recommend" be read out of Section 2(11). *See Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1116 n.4 (2007) ("the effective recommendation of discipline need not encompass the authority to make disciplinary decisions unilaterally"). And even one of Petitioner's witnesses, Stefani Furlong, testified that her recommendation that a Case Manager be fired for not meeting a performance improvement plan's requirements was effective. (Tr. 302 "Q. So – so, you recommended that since he was not meeting the performance improvement plan's requirements, they are subject to termination? A. I recommended we follow what the PIP outlined.") In any event, once a Program Coordinator chooses to initiate discipline, the progressive system for discipline has definitively commenced. Accordingly, the record evidence plainly reflects that Program Coordinators are more than just a passive conduit of information in The Arc's disciplinary process.

Accordingly, for this reason as well, Program Coordinators should have been found to be supervisors under the Act. *See Oak Park Nursing Care Ctr.*, 351 NLRB 27, 28 (2007) ("While the Regional Director found that the LPNs do have the authority to fill out employee counseling forms, he concluded that the LPNs' role in doing so was merely a reportorial role that did not evince any supervisory authority. His finding in this respect was based, in large part, on his determination that the counseling forms neither constitute discipline, nor automatically lead to discipline. Contrary to the Regional Director, however, it is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for

future discipline against an employee.”); *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1115-18 (2007) (supervisory authority to discipline found where front desk supervisor initiated the discipline process through coach-and-counsel sessions, recommended to management that additional discipline was warranted, and management conducted no independent investigation before deciding to impose discipline but relied on facts giving rise to discipline provided to management by the employee); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474-75 (2004) (supervisory authority to discipline found where lead deck supervisor initiated the disciplinary process by bringing disciplinary issues to the attention of the director of housekeeping who decided the level of discipline based on the supervisor’s account and typically followed the supervisor’s recommendations without an independent investigation); *Progressive Transportations Services, Inc.*, 340 NLRB 1044, 1045 (2003) (holding that a supervisor effectively recommended discipline by “bring[ing] rule infractions and misconduct to [Management’s] attention, thereby initiating the discipline process.”).

#### **V. The Acting Regional Director Also Erred in Refusing to Consider Secondary Indicia.**

While secondary indicia cannot, by themselves, establish supervisory authority, “it is settled that secondary indicia, including the individual’s job title or designation, as well as the perception of others that the individual is a supervisor may be used in making supervisory determinations when evidence of primary indicia is present.” *Avante at Wilson, Inc.*, 348 NLRB 1056, 1061 (2006). The Arc does not quibble with the proposition cited by the Acting Regional Director that there is no need to assay evidence of secondary indicia of supervisory status if there is no evidence that an individual possesses any of the primary indicia. (Decision at 27.) Here, however, there was evidence that the Program Coordinators possessed primary indicia of supervisory authority. The Acting Regional Director simply decided not to consider that

evidence or determined that there was not enough evidence. However, if the Acting Regional Director's decision is right, there would never be a need to consider secondary indicia because the issue could be resolved on the basis of primary indicia alone.

Here, the record is replete with evidence of secondary indicia that confirms the supervisory status of Program Coordinators. For instance, Program Coordinators are responsible for preparing the performance appraisals of all staff that they supervise, and their comments are relied upon heavily by the Knox and DeMeritt, who have little firsthand knowledge of the skills of the staff. Indeed, the Program Coordinators refer to themselves as "supervisors" when signing off on time off requests, performance evaluations, and community outing approval forms. (Ex. E-22(a)-E-22(f)), E-23-E-26, Ex. E-27(a)-E-27(e).) Program Coordinators also organize and lead team meetings, participate in supervisory training programs, and participate in meetings with management that their staff do not attend. Case Managers also view Program Coordinators as "the boss." Finally, the Program Coordinators are paid about \$6,000 more per year than Case Managers receive.

All of these secondary indicia constitute further evidence of the Program Coordinators' status as statutory supervisors, and the Acting Regional Director improperly ignored such evidence.

## **CONCLUSION**

Proper application of the Board's prior decisions leads to the conclusion that the Program Coordinators are statutory supervisors. Given the role that the Program Coordinators have in the primary indicia of hiring, directing the work of the Case Managers, making Case Managers' assignments, and discipline, the Program Coordinators clearly meet the test for supervisory status under the Act. Added to this is their role and authority with respect to such secondary indicia as approving time off, oversight and training of the documentation process, and performance

evaluations of Case Managers. Moreover, The Arc treats them as supervisors, paying them a salary like other senior managers in contrast to Case Managers who are hourly employees, and including the Program Coordinators in key decisions about the structure of the Day Habilitation Program and in The Arc's management training program. Finally, the testimony of the only Case Manager to testify at the hearing clearly showed that Case Managers consider their Program Coordinator to be their supervisor with authority and control over the Group Room and the day-to-day work that the Case Managers perform.

Once his unsupported factual findings, disregard of most of the evidence adduced at the hearing, and application of the correct standard for establishing supervisory status is corrected, it is beyond peradventure that the Program Coordinators are supervisors that should not have been included in the bargaining unit. These errors are prejudicial and constitute compelling reasons for review and reversal of the Acting Regional Director's decision. In the alternative, to the extent the Acting Regional Director's decision is consistent with prior precedent, a compelling reason exists to reconsider such precedent.

Respectfully submitted,

THE ARC OF SOUTH NORFOLK,

By its Attorneys,

/s/ John E. Duke

Andrew L. Eisenberg, Esq.

Telephone: (617) 849-7887

Facsimile: (617) 849-7879

*aeisenberg@constangy.com*

John E. Duke, Esq.

Telephone: (617) 379-3409

Facsimile: (617) 401-9495

*jduke@constangy.com*

CONSTANGY, BROOKS, SMITH & PROPHETE LLP

535 Boylston Street, Suite 902

Boston, MA 02116

Phone: (617) 849-7880

Dated: April 6, 2018

### CERTIFICATE OF SERVICE

I, Andrew L. Eisenberg, hereby certify that, on April 6, 2018, I served a copy of the foregoing document on Joe DeLorey, Esq., General Counsel, AFSCME Council 93, and Erin L. DeRenzis, Esq., Assistant General Counsel, AFSCME Council 93, by e-mailing copies of the foregoing document to Joe DeLorey at [jdelorey@afscme93.org](mailto:jdelorey@afscme93.org), and Erin DeRenzis at [ederenzis@afscme93.org](mailto:ederenzis@afscme93.org). I also certify that I have filed a copy of the foregoing document with Paul J. Murphy, the Acting Regional Director for Region 1 of the National Labor Relations Board, via the Board's e-filing application.

/s/ John E. Duke

John E. Duke